

National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: August 28, 1998

TO: Paul Eggert, Regional Director, Region 19

FROM: Barry J. Kearney, Associate General Counsel, Division of Advice

SUBJECT: Albertson's, Inc., Case 19-CA-25926

524-0183-3333-6700

This Section 8(a)(3) case was submitted for advice on whether the Employer's lowering of wages, because of its interpretation of the newly applicable collective-bargaining agreement, was unlawful as "inherently destructive" of employee Section 7 activity;⁽¹⁾ and if so, whether further proceedings should be deferred to the parties' grievance-arbitration procedure.

The Union's bargaining agreement contained an after-acquired stores clause as well as a two tiered wage system which provided higher wages for employees hired before March, 1991. The agreement also contained the following provision, Article 23.2, concerning employee remuneration and contract applicability:

No employee shall suffer any loss of his hourly rate of pay by reason of the signing or adoption of this Agreement; however, the terms of this Agreement are intended to cover only minimums of wages and other employee benefits. The Employer may place superior wages and other employee benefits in effect and may reduce the same to the minimums herein prescribed without the consent of the Union.

In July 1997, the Employer opened a new store and initially paid employees nonunion wages and benefits. In April 1998, the Union obtained a majority of authorization cards from the new store employees and demanded recognition and application of the bargaining agreement. The Employer thereafter accorded recognition and applied the contract. The Employer in particular applied the contractual two tiered wage provision, with the result that some employees retained their wages, one employee had his or her wages increased, but numerous employees had their wages decreased.

The Union protested the Employer's lowering of wages, arguing that Article 23.2 precluded that result. The Employer disagreed with the Union's interpretation of that Article and offered to arbitrate its interpretation allowing the reduction of wages. The Region uncovered no evidence of union animus in the Employer's conduct regarding its application of the contract. The Union filed the instant charge alleging that the lowering of the employees' wages was a direct consequence of the employees' selection of Union representation and therefore "inherently destructive" of that union activity.

We conclude that the Region should dismiss this charge, absent withdrawal, because the Employer's motivation for reducing employee wages was based solely its reasonable interpretation of the contract.

In P.W. Supermarkets,⁽²⁾ the employer subcontracted some unit work and discharged two unit employees based upon claimed business considerations, viz., the realization of substantial cost savings from increased wages and benefits that would have had to have been paid as a result of the union's previous successful filing of a grievance. The ALJ found that the employer's subcontracting decision was unlawful as "inherently destructive" of employee Section 7 rights, i.e., was a result of the grievance filing which would have resulted in higher wages and benefits. The Board disagreed and dismissed the allegation, finding that there was no causal connection between the subcontracting and the grievance filing:

To be sure, the grievance affected the outcome of the Respondent's cost analysis, but to attempt to connect causally the grievance with the discharges is to mistake a link in the causal chain for the cause itself ... [A]ny time a union secures economic gains through the collective-bargaining process, it runs the calculated risk that the increased costs may compel the

employer to adopt cost-motivated changes such as layoffs or subcontracting.

The Union argues that P.W. Supermarkets is distinguishable because there the employer's decision clearly was economically motivated, i.e., the employer demonstrated substantial cost savings to be realized from its subcontracting. In contrast, the Union argues that the Employer here is motivated by an interpretation of the collective-bargaining agreement which is not correct. The Union relies upon the precatory language of Article 23.2 which provides that "No employee shall suffer any loss of his hourly rate of pay by reason of the signing or adoption of this Agreement . . ."

We reject this argument because this precatory language of Article 23.2 is in conflict with the last sentence of that provision, which supports the Employer. This last sentence expressly provides the Employer with the discretion to raise and/or lower wages. In our view, the Employer may reasonably interpret the entire Article as intending this final Employer discretion to override the conflicting precatory language involving employee loss.

Given its reasonable interpretation of the contract, the Employer here, as the employer in P.W. Supermarkets, also evinced a clearly economic, non-Section 7 motive, i.e., cost savings from the payment of lower wages. We note that the Employer's contract interpretation gives it the discretion to lower wages, and does not mandate that result. However, the decision to subcontract in P.W. Supermarkets also was wholly discretionary. The essential point is that employer motivation in both cases is economic; the Employers' reaction here thus was not "caused" by the employees Section 7 activity.

We therefore apply the rationale of P.W. Supermarkets and conclude that this conduct was not "inherently destructive" of Section 7 rights.

B.J.K.

¹ See *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967).

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² 269 NLRB 839 (1984). See also *MacDonald Miller Co.*, 277 NLRB 701 (1988)(mere fact employee discharged because of grievance filing not "inherently destructive").